No. 166

JUN 10 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM

ANTHONY VOLKRINGER, also known as TONY E. VOLKRINGER,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the

Supreme Court of the United States

October Term

Anthony Volkringer, also known as Tony E. Volkringer,

Petitioner,

against

The United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Hon. Chief Justice and the Associate Justices of the Supreme Court of the United States:

Anthony Volkringer, also known as Tony E. Volkringer, by his attorneys, Elliott M. Weiner and Hiram B. Odell, Jr., the said Elliott M. Weiner being duly admitted to practice in the Supreme Court of the United States, prays that a writ of certiorari issue to review the judgment and order of the United States Circuit Court of Appeals in and for the Second Circuit entered in the above case on the 11th day of March, 1946, affirming a judgment herein of the United States District Court in and for the Southern District of New York, confirming the report and award of the commissioners.

Opinions Below

The opinion of the District Court is set forth in the record at pages 271 to 280 inclusive, and is not officially reported.

The opinion of the Circuit Court of Appeals is set forth at pages to of the record inclusive, and is not officially reported.

The order of the Circuit Court of Appeals affirming the judgment of the District Court appears in the record at page .

Jurisdictional Statement

The order and judgment of the Circuit Court of Appeals was entered in the office of the Clerk of that court March 11, 1946.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended; Section 347, Vol. 28, U. S. C. A.:

Statement of Law Involved

The proceedings in condemnation were instituted by the filing on the part of the respondent of a declaration of taking (p. 5) on June 20, 1942, the deposit in the Registry of the Court of the sum of money stated therein as the estimated compensation to be made (p. 26), and the filing of a notice and petition in condemnation, verified July 3, 1942, returnable October 27, 1942 (p 35). Judgments on the declaration of taking were signed by Hon. John Bright, United States District Judge, on the 16th day of April, 1943 (p. 25), and on August 10, 1943 (p. 29).

Thereafter the case came on for the submission of proof. The commissioners filed their opinion and report (p. 263).

Thereafter, and on January 3, 1945, the petitioner duly filed his notice of appeal by which he appealed the order of the District Court, granted September 13, 1944, filed

October 6, 1944, confirming the report of the commissioners, and from all judgments and orders filed herein, in so far as the same affects the petitioner and parcel 78 in this proceeding.

Thereafter, the case came on for hearing before the United States Circuit Court of Appeals for the Second Circuit and was argued February 8, 1946.

Thereafter, a decision was handed down by the United States Circuit Court of Appeals on March 11, 1946, which decision affirmed the judgment of the District Court.

The Circuit Court, in affirming the judgment of the court below, as to the sufficiency of the award, gave as reasons for affirmance that the matter should be decided in accordance with the law of the State of New York, and not in accordance with the precedents established by the United States Supreme Court.

The petitioner claims that the case should be decided in accordance with precedents established by the United States Supreme Court, and more particularly claims that, initially, the award granted petitioner was based upon an erroneous theory of law and was, in fact, so low as to shock the conscience of the Court, and urged on this point *Boom Company* v. *Patterson,* 98 U. S. 403; *Olsen* v. *United States,* 292 U. S. 246; *United States* v. *Powelson,* 319 U. S. 266.

The United States Circuit Court of Appeals, Second Circuit, in an opinion affirming (p.) refused to consider these precedents, but based its decision on precedents established in the State of New York.

Scope of Argument

The question here presented briefly is the following: Should the Court below, in passing on the sufficiency of the award, follow the law of New York State or the

precedents established by the United States Supreme Court? It is the petitioner's contention that Rules 81 (a)(7) and 53(e)(2) of the Federal Laws of Civil Procedure apply, and not Section 258 of Title 40, U. S. Code, which latter requires the Court to follow the practice of the New York courts in deciding whether the Judge was right in affirming the award, and that because the latter was applied, the judgment of the court below should be reversed, since the award, as made, was so low as to shock the conscience of the Court. *Boom Company* v. *Patterson,* 98 U. S. 403.

Statutes Involved

The statutes involved are Section 258 of Title 40, U. S. Code and Section 257 of Title 40, U. S. Code; Rule 81 (a) (7) of the Rules of Civil Procedure following Section 723 (c) of Title 28, U. S. Code; Section 14 of the New York State Condemnation Law. These statutes, in so far as applicable, are set forth in the appendix.

Reasons for Granting the Writ

The question here presented is concerned with the amount of the award. The award, as made, was based upon an erroneous theory of value, and was so low as to shock the conscience of the Court. Since this question was before the Circuit Court of Appeals for the Second Circuit on an appeal from the United States District Court for the Southern District of New York, it should have been decided in accordance with Rules 81 (a)(7) and 53 (e)(2) of the Federal Rules of Civil Procedure, and not in accordance with the New York State law, under the authority of Section 258 of Title 40, of the U. S. Code. Had it been decided in accordance with the former, the Court below, it is contended, would have been

compelled to take into consideration, according to well-settled Federal Law, that when value is arrived at in a condemnation proceeding, it is the highest and most profitable use to which the land can be put that determines such value, and that use need not be the use to which the land is put at the time of the taking so long as such use is inherent in the land. *Boom Company* v. *Patterson,* 98 U. S. 299; *Olsen* v. *United States,* 292 U. S. 246, 255.

Since patently the award as made did not take into consideration the highest and most profitable use to which the petitioner's land could be put, the award, as made, was based upon an erroneous theory of value resulting in an award so low as to shock the conscience of the Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court to review the decision of the Court below.

Dated: June 7, 1946.

ELLIOTT M. WEINER,
HIRAM B. ODELL, JR.,
Attorneys for Petitioner,
44 Smith Street,
Newburgh, New York.

Appendix

The laws referred to herein are as follows:

(a) Section 258 of Title 40 of the U. S. Code reads as follows:

> "The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of Section 257 of this Title shall conform as near as may be to the practice, pleadings, forms and proceedings existing at the time, in like causes, in the Courts of Record of the state within which such District Court is held, any rule of the Court to the contrary notwithstanding."

(b) Section 257 of Title 40 of the U. S. Code is as follows:

> "In every case in which the Secretary of the Treasury, or any other officer of the government, has been, or shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be authorized to acquire the same for the United States by condemnation under judicial process whenever, in his opinion, it is necessary or advantageous to the government to do so. And the United States District Courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and Section 258 of this Title, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

(c) Rule 81 (a)(7) is as follows:

"In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals, but are not otherwise applicable."

(d) Rule 53 (e)(2) is as follows:

"In an action to be tried without a jury, the Court shall accept the master's findings of fact, unless clearly erroneous. Within ten days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The Court, after hearing, may adopt the report or may modify it or may reject it in whole or in part, or may receive further evidence or may recommit it with instructions."

(e) Section 14 of the Condemnation Law of the State of New York, is as follows:

"The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpoenas and administer oaths to witnesses; a majority of them may adjourn in the proceedings before them from time to time, in their discretion * * *. They shall view the premises described in the petition, and hear the proof and allegations of the parties and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the plaintiff to the owner of the property

appraised by them; and in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owner may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use * * *. They shall make a report of their proceedings to the Court which appointed them, with the minutes of the testimony taken by them, if any, * * *."

In the

Supreme Court of the United States

October Term

Anthony Volkringer, also known as Tony E. Volkringer,

Petitioner,

against

The United States of America,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary statement

The opinions below, the statement of the matter involved and the questions presented appear in the petition for a writ of certiorari herein and in the interest of brevity are incorporated here by reference.

II

SUMMARY OF ARGUMENT

POINT I.

The Court below, in affirming the judgment of the District Court, was in error in applying section 258 of Title 40 U. S. Code and not Rules 81 (a) (7) and 53 (e) (2) of the Federal Rules of Civil Procedure.

POINT II.

The Commissioners, in their award to petitioner, failed to take into consideration the highest and most profitable use to which his property was adaptable and for which it was needed. Such use was the rental of the land as a source of supply of peat moss.

POINT III.

The Court below was in error in confirming the report of the Commissioners because it failed to recognize uncontradicted testimony concerning the highest and most profitable use to which the property of petitioner could be put.

POINT IV.

The government expert was patently unqualified to testify with respect to value in so far as his testimony respecting the land of petitioner is concerned.

POINT V.

The judgment and order below should be reversed since from the entire record it appears that the rejection of testimony affecting the highest and most profitable use of the land of petitioner was prejudicial.

POINT I

The Court below, in affirming the judgment of the District Court, was in error in applying Section 258 of Title 40, U. S. Code and not Rules 81 (a) (7) and 53 (e) (2) of the Federal Rules of Civil Procedure.

The decision of the Circuit Court of Appeals for the Second Circuit reasons that if the award had been made by a Judge "it is at least not apparent that we ought to have held it 'clearly erroneous'." Citing *United States* v. *Lambert*, 146 Federal 2nd 469. The Court then continues that the award was made by a commission and states that a preliminary question arises as to the extent of its review, and points out that Rule 81 (a)(7) makes the Rules of Civil Procedure apply to condemnation cases, and Rule 53 (e)(2) makes a master's findings conclusive

upon the District Court, if not "clearly erroneous"—the same test which applies to the findings of the District Court upon an appeal to the Circuit Court. The Court is of the opinion that Rule 81 (a)(7) does not apply to the review of a master or referee on the one hand, and commissioners on the other hand, and the Court concludes that since Section 258 of Title 40, U. S. Code, requires the Court to follow state procedure, the practice in New York State Courts should be followed in deciding whether the Judge was right in confirming the award.

Rule 81 (a)(7) reads as follows:

> "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals, but are not otherwise applicable."

Rule 53 (e)(2) reads as follows:

> "In an action to be tried without a jury, the Court shall accept the master's findings of fact, unless clearly erroneous, within ten days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The Court, after hearing, may adopt the report or may modify it or may reject it in whole or in part, or may receive further evidence or may recommit it with instructions."

Section 258 of Title 40 of the U. S. Code reads as follows:

> "The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of Section 257 of this Title shall conform as near as may be to the practice, pleadings, forms and proceedings existing in the Court of Record of the state

within which such District Court is held, any rule to the contrary notwithstanding."

Section 257 of Title 40 of the U. S. Code reads as follows:

"In every case in which the Secretary of the Treasury or any other officer of the government has been, or shall be, authorized to procure real estate for the erection of a public building, or for other public uses, he shall be authorized to acquire the same for the United States by condemnation under judicial process whenever, in his opinion, it is necessary or advantageous to the government to do so. And the United States District Court of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury under this Section and Section 258 of this Title, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

Section 258 of the Code applies to "practice, pleadings, forms and modes of proceedings", and, as this term implies, refers to the Law of Procedure or Adjective Law. The award, as made by the commissioners, and as confirmed by the District Court and affirmed by the Circuit Court, is either correct or incorrect, depending upon whether or not it is erroneously made and depending upon whether or not it shocks the conscience of the Court and whether or not it is predicated on the idea of an erroneous theory of law. In any event, the question of the award is one of substance and not of procedure, and hence the provisions of Section 258 do not apply, but on the other hand, the provisions of Rule 81 (a)(7) and Rule

53 (e)(2) do apply, since the former rule distinctly states that the Rules of Civil Procedure shall apply to appeals in condemnation cases.

The effect of the above is to apply the Federal Law to the adequacy or inadequacy of the award, and not the New York State law.

POINT II

The Commissioners, in their award to petitioner, failed to take into consideration the highest and most profitable use to which his property was adaptable and for which it was needed. Such use was the rental value of the land as a source of supply of peat moss.

Just compensation, within the meaning of the Fifth Amendment to the Federal Constitution, is the "fair market value of the property contemporaneously paid in money at the time of the taking."

> *Seaboard Airline R. Co.* v. *United States*, 261 U. S. 299.

In formulating the basis for such value it is the highest and most profitable use to which the property is, or can be, but which must be considered. The Court in the leading case of *Boom Company* v. *Patterson*, 98 U. S. 403, at pages 407, 408, says:

> "In determining the value of land appropriated for public purposes * * * the inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the neces-

> sities or conveniences of life. Its capability of being thus available gives it a market value which can be readily estimated."

To the same effect the Court in *Olsen* v. *United States,* 292 U. S. 246, says at page 255:

> "The highest and most profitable use for which the property is adaptable and needed, or is likely to be needed, in the near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

Also, in *United States* v. *Powelson,* 319 U. S. 266, at page 275, the Court says:

> "The owner of lands sought to be condemned is entitled to 'their market value' fairly determined. That value may reflect not only the use to which the property is presently devoted, but also that use to which it may be readily converted."

It is contended by petitioner that, based upon the principles above enunciated, that the highest and most profitable use to which his property could have been put at the time of his ownership thereof was the rental of said property as a source of supply of peat moss. To establish evidence of value in this connection this petitioner brought as a witness Mr. Gaetano Rossitto (pp. 149-164), a man who testified that he had been engaged in the business of marketing peat moss for upwards of ten years, and that he was familiar with the quality and type of the material (p. 149). Mr. Rossitto stated that he had examined the peat moss on the land of Anthony Volkringer (pp. 149, 150, 151, 152, 153, 154), and that he estimated the quantity on said land to be 112,000 cubic yards (p. 153). He further stated that he knew the fair market value of

the material on the ground to the owner, and that said material was worth 20 cents per cubic yard after it was processed (p. 153), and that a market exists for this product at all times (p. 153). Mr. Rossitto then testifies as follows (p. 154):

> "Q. When that material is processed and ground, does it cause any change in the cubic yardage? A. Yes, because actually the stuff that we find in the swamp is packed.
>
> "Q. What is the state of it when sold? A. It is ground. There is an increase, I should say, of approximately 25 per cent in volume.
>
> "Q. In volume the quantity would increase by 25 per cent when it is ready to be sold? A. After it is ground.
>
> "Q. Is this price of 20 cents per cubic yard which you have given us the fair market price? A. Yes, as the truck goes out with the processed goods. * * * We process the goods and then the truck goes out and we show that it is 40 yards, and we give a slip to the owner of 40 yards that went out, and it is processed goods, and we pay 40 times 20 cents.
>
> "Q. It is paid for on the cubic content of the finished product? A. Yes, what the truck takes out of the place, that is what we pay him.
>
> "Q. That is 25 per cent higher than the cubic content of the packed bog? A. In other words, compact. We figure 1600 yards per acre. After it is taken out and ground there will be 25 per cent increase after grinding. In other words, if we take 10 yards of material compact from the farm and after it is ground up, we will ship approximately 12½ yards."

Mr. Rossitto further testified that for the past 7½ years he leased some property outside the Village of Goshen, New York, for the excavation of peat moss (p. 155), and that during this period he had taken out ap-

proximately 100,000 cubic yards paying the owner royalty at the rate of 20 cents per cubic yard (p. 156).

It is to be noted that in the face of a most thorough and searching cross examination Mr. Rossitto's testimony as to three factors was not in the least shaken, (1) his estimate of 112,000 cubic yards on the land, (2) a fair market value of 20 cents per cubic yard when processed, and (3) this price is paid to the owner of the land.

That the witness, Rossitto, made a careful and painstaking survey of the peat moss on this petitioner's land has also not been contradicted. He made numerous soundings with an instrument designed to test the material as to quantity (pp. 151, 152), and it was as a result of this procedure that he arrived at the final quantitative figure.

As against this uncontradicted testimony, the Government failed to bring forth any expert to prove either that Rossitto's estimate as to quantity was incorrect, or that the fair market price of the material was anything other than he said it was.

It is, therefore, contended that because there was a failure to take into consideration the highest and most profitable use to which this land could be put, the award as made and confirmed was shockingly low, and resulted in injury to the petitioner.

POINT III

The Court below was in error in confirming the report of the Commissioners because it failed to recognize uncontradicted testimony concerning the highest and most profitable use to which the property of petitioner could be put.

In affirming the report of the commissioners, the Hon. John Bright, in his opinion, said (p. 277):

> "One witness called by them estimated that this muckland, contained over 112,000 cubic yards of peat moss, which, when dug, dried, ground, and made ready for the market, sold for twenty cents a yard. *But no witness testified to the expense of so preparing the moss, or as to the market value of the land based on such commercial use, which apparently had never been attempted.*" (Italics mine.)

and again (p. 272):

> "The award made by the commissioners after hearing the testimony and viewing the property, is binding here *unless so insufficient as to shock the conscience of the Court,* or based upon a wrong theory, or the result of erroneous admission or rejection of evidence. Here the only contention made against the confirmation is that the awards are shockingly insufficient." (Italics mine.)

It is contended that the Court below erred in confirming the award made petitioner. The Court ignores the uncontradicted testimony of the witness, Rossitto, that the price of 20 cents per cubic yard is paid the owner of the land for the material processed, after it is taken from the ground; that the owner of the land is not concerned in any way with the expense of processing the material; that he is not in any way concerned with the labor or expense connected with the excavation and removal of the material from the ground, all of which expense is borne by the person or firm leasing the land from him.

The Court further erred in ignoring the uncontradicted testimony of Rossitto when he stated that in an operation involving peat moss land outside the Village of Goshen, in the past 7½ years, approximately 100,000 cubic yards of the material were excavated, for which 20 cents per cubic yard royalty was paid the owner. It is contended that, based upon an operation in Orange

County of similar property involving the excavation of 10,000 or more cubic yards per year of the material, for which the owner was paid at the rate of 20 cents per cubic yard, the market value of the land of petitioner can be readily capitalized.

And, when the Court states that no witness testified to "the market value based on such commercial use, which apparently never has been attempted", it ignores the principal enunciated in *Boom* v. *Patterson, supra,* and other cases cited, to the effect that the highest and most profitable use to which the property can be put need not be that use which is employed by the owner at the time of the taking.

In the case of *Olsen* v. *United States,* 292 U. S. 246, the Court, at page 255, says:

> "Just compensation includes all elements that inhere in the property * * *. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable."

POINT IV

The Government expert was patently unqualified to testify with respect to value in so far as his testimony respecting the land of petitioner is concerned.

Opposing the uncontradicted and complete testimony of the witness, Rossitto, respecting the fair market value of peat moss to the owner of the land, there is the testimony of the Government witness, Yates. He testifies as follows (pp. 246, 247):

> "Q. This land of Anthony Volkringer, you testified that there were about seven acres of black muck land. How much do you value that land at? A. I have not

separated any of the land. I have taken it as a whole, at an average price of $75 per acre on both of them.

"Q. There is no muck land on Stephen Volkringer's property? A. None to speak of, very little.

"Q. You appraised that at $75 an acre, too? A. That is right.

"Q. Are you able to tell us how much you valued the seven acres of muck land of Anthony Volkringer? A. I did not make any separate value of that or break it down in that way. I considered it as a type of land, part of which might be a better type. I took that into consideration in my appraisal.

"Q. But you have not added any value to it for having that muck land? A. *I appraised what was there. If he did not have that land on the property, my appraisal would be lower.*" (Italics mine.)

The appraisal, as made by this witness in the case of 10 acres of ordinary farm land of petitioner, was $800, or at the rate of $80 per acre (p. 276). The appraisal made by said witness in the case of Volkringer's land, 7 acres of which were concededly muckland, was $1,400, or $74.86 per acre (p. 278).

The ordinary farming land of the two Volkringers were contiguous and in every way comparable. In view, therefore, of the statement of the witness that he made suitable allowance for the muckland on Anthony Volkringer's property, whereas the appraisal that he actually made shows that no such allowance was made, it is contended that he was absolutely unqualified to express an opinion as to such value.

It is conceded that opinion evidence standing alone is inconclusive. Yet, the Government offered Mr. Yates' bald opinion as to value in this instance, and his testimony on the one hand, and the appraisal of this particular piece of muckland on the other, shows that he did not

possess the "peculiar" means of forming an intelligent and correct judgment.

The commission has by its disregard of the use of the highest value rendered this judgment subject to the fundamental error, that it shocks the conscience of the Court, and this is reversible error.

POINT V

The judgment and order below should be reversed since from the entire record it appears that the rejection of testimony affecting the highest and most profitable use of the land of petitioner, was prejudicial.

The Court, in *United States* v. *River Rouge,* 269 U. S. 411, says, at page 421:

> "It suffices to say that since the passage of this act (Sec. 391, U. S. Code, Title 28), as well as before, an error which relates, not merely to formal or technical matters, but to the substantial rights of the parties * * * is to be held ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party."

In *McCandless* v. *United States,* 298 U. S. 342, the Court says, at page 347:

> "in an eminent domain proceeding, the vital issue—and generally the only issue—is that of just compensation. The proof here offered necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down by the Olsen case, 292 U. S. 246. To exclude from the consideration of the jury evidence of this elementary character could not be otherwise than prejudicial."

In the *McCandless* case, the lands condemned were used as a cattle ranch. The owners had in mind the ultimate use of the lands for the growing of sugar cane, which would require the bringing of water from a distance for irrigation purposes. Testimony was introduced to the effect that 3,000 acres were suitable for this purpose, which would produce 70 to 75 tons of sugar per acre. Petitioners offered to prove that water could be impounded and transported and used for the cultivation of sugar cane. This offer was rejected by the Trial Court on the ground that the possibility was too remote and speculative. In reversing, the Court, at page 347, says:

> "Apparently what was meant by the offers not being sufficiently specific * * * is that they did not show what would be the value of the land when reclaimed, nor the cost of developing and delivering a sufficient water supply * * *. Faced with that ruling and implication, counsel was not required to offer further evidence along that line. In this situation, Par. 69 (Sec. 391, U. S. Code, Title 28) is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly indicates, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial."

The petitioner offered to prove, through the witness, Rossitto, the price paid for peat moss after it was dried and ground (pp. 162, 163). This was objected to, and the objection was sustained (p. 163).

It is contended that the rejection of this testimony was prejudicial. Its exclusion precluded the establishment of

value based upon the highest and most profitable use to which the land of petitioner could be put by any person contemplating its purchase for the purpose of himself going into the peat moss business, because there is nothing on the record which would indicate whether or not such a venture would be profitable. The effect of the exclusion of such testimony could only have one result—to remove from the consideration of the commissioners the highest and most profitable use to which the property could be put, with the consequence that the award as made was so low as to shock the conscience of the Court, and so act to the prejudice of the land-owner. This contention is also borne out by the opinion below, which says (p. 278):

> "But no witness testified to the expense of so preparing the moss."

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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702110—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 166

ANTHONY VOLKRINGER, ALSO KNOWN AS TONY E. VOLKRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 271–280) is not reported. The opinion of the circuit court of appeals (R. 301–307) is reported in 154 F. 2d 224.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 11, 1946 (R. 308). The petition for a writ of certiorari was filed on June 10, 1946. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in this condemnation proceeding there was substantial evidence to support the finding of commissioners as to the fair market value of the property taken.

STATEMENT

This case arose from condemnation proceedings instituted on July 3, 1942, accompanied by a declaration of taking upon which judgment was entered the same date, to acquire 1,172.11 acres of land in Orange County, New York (R. 5–15, 25–26, 29–30) needed for use in connection with the expansion of the West Point Military Reservation for additional training facilities and related military purposes (R 16). This petition involves one parcel of land included in the taking, Tract No. 78, consisting of 18¾ acres owned by Anthony Volkringer, a farmer, who had devoted it principally to the pig business. (R. 148, 169, 198, 211–212).

Seven acres of this tract were drained black muckland (R. 169, 200, 247), and according to the landowner's witness, Rossitto, who was in the peat moss business, contained over 112,000 cubic yards of peat moss which the owner could sell for twenty cents a yard (R. 153, 156), although there was no evidence that he had ever done so (cf. R. 158, 211,

213). Rossitto did not testify as to market value based on such use of the land, and stated on cross-examination that he had no knowledge of the market value of such lands (R. 157, 162, cf. 277). The only testimony of market value given for the owner was that of his expert witnesses Brown and Wallace, who valued the property with improvements at $6700 and $6095 respectively, Brown allotting $4200, and Wallace $3200, to the muckland, which they both testified they had valued as farmland and not as commercial peat bog (R. 169, 170, 200, 201, 278). Government witness Yates, a real estate expert, valued Tract No. 78 with improvements at $2800, of which $1400 was for all the land, including the muckland (R. 214, 233, 278). He stated on cross-examination that he gave consideration in his appraisal to the presence of peat moss and, absent that element, his appraisal would have been lower (R. 247).

The commissioners, who viewed the property both before and after hearing the testimony (R. 147, 263–264), awarded $3750 for this parcel giving a higher per acre value to the muckland (R. 267, 278). When the Government moved for an order confirming the report of the commissioners, Volkringer opposed it (R. 269, 271, 283). The district court confirmed the report, writing an opinion which analyzed the evidence and con-

cluded that the award seemed reasonable and fair (R. 277–280, 284). Upon appeal by Volkringer, the circuit court of appeals found nothing in the record to justify a conclusion that the commissioners had followed an erroneous rule of law or that the evidence compelled a different award, and affirmed the judgment of the district court (R. 305, 307).

ARGUMENT

Petitioner asserts that in valuing his property the commissioners failed to consider the highest and best use to which the property was adaptable (Pet. 13–18). But as the Statement (*supra*) shows, the witnesses and the commissioners did consider the possibility of use for the sale of peat moss. Petitioner's complaint really is that the property was not valued as if it were being used for that purpose at the date of taking. This complaint lacks foundation. While the highest and most profitable use is to be considered "to the full extent that the prospect of demand for such use affects the market value," it is "not necessarily * * * the measure of value." *Olson* v. *United States,* 292 U. S. 246, 255. Thus, there was no misapplication of applicable rules of law but merely, as the trial court said (R. 279), "the usual dispute as to values, given by witnesses." Similarly, petitioner's attack (Pet. 18–20) upon the Government's expert witness constitutes

simply assertions concerning the weight to be given his testimony.[1]

As both courts below have held, there was substantial evidence to support the commissioners' conclusion as to market value of petitioner's tract (see Statement, *supra*). There is, therefore, as applied to the facts here, no difference between federal and state law as petitioner asserts (Pet. 10–12). Under either rule, review is limited to errors of law and does not permit reversal of findings which are supported by substantial evidence. Moreover, the court below was clearly correct in its holding (R. 305–307) that because the commissioners were authorized to view the property and to use their special knowledge the factual review on appeal is necessarily more limited than in the usual case of findings when all the evidence is in the record. Thus, the holding is not that federal appellate courts are bound to conform to the practice of state appellate courts (cf. Pet. 10–12) but that, when conformance is had in the federal trial courts to the local commissioner procedure the same considerations which lead the state appellate courts to restrict review of commissioners' awards apply to the federal courts.

[1] The qualifications of an expert is, of course, a matter which rests in the discretion of the trial court. *Love* v. *United States*, 141 F. 2d 981, 983 (C. C. A. 8); *Redman* v. *United States*, 136 F. 2d 203 (C. C. A. 4).

CONCLUSION

The decision of the circuit court of appeals is in accordance with established principles of law. There is no conflict of decisions nor question of general importance. It is therefore respectfully submitted that the petition should be denied.

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